IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-685

COUNTY OF SUFFOLK and CONCERNED CITIZENS OF MONTAUK, INC.,

Petitioners,

v.

SECRETARY OF THE INTERIOR,

Respondent,

NATIONAL OCEAN INDUSTRIES ASSOCIATION and NEW YORK GAS GROUP,

Intervenors-Respondents.

REPLY OF PETITIONERS COUNTY OF SUFFOLK AND CONCERNED CITIZENS OF MONTAUK, INC. TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: February 8, 1978

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Argument

Respondents' opposition to certiorari merely echoes the Court of Appeals' confusion of Rule 52(a), F.R. Civ. P., appellate review with the NEPA "rule of reason" test in a vain effort to justify *de novo* review and reversal by the Court of Appeals. Respondents fail to address the specific fact review errors cited by petitioners, *Petition,* 10-18, which were committed by the Court of Appeals in reversing the District Court's findings of unreasonableness on the Secretary's part.

As Mr. Justice Marshall noted in reviewing an earlier phase of this case, the issue of the adequacy of the EIS, evaluated by employing the "rule of reason", is a "fact intensive" issue. *State of New York* v. *Kleppe*, 429 U.S. 1307, 1311 (1976). Hence, the inviolability of the District Court's findings, to the extent that they are not "clearly erroneous", is all the more crucial on this issue.

I

Respondents attempt to evade the issue in two ways:

First, they argue that the Court of Appeals applied the F.R.Civ.P. 52(a) "clearly erroneous" standard to the District Court's finding of fact and did not disturb them.[1] This is not true. While giving lip service to Rule 52(a) (Petition, A10, 11), the Second Circuit pointedly disputed and reversed the District Court's evidentiary findings on the tanker/pipeline and cost benefit issues,[2] without in any way demonstrating that they were "clearly erroneous".

[1] National Ocean Industries Association Opposition (NOIA), 10, 11; Brief for the Secretary of the Interior in Opposition (Secretary), 7, 9.

[2] Petition, 10-18. Two examples are illustrative. The Second Circuit found that projection of specific pipeline routes was neither meaningfully possible nor reasonably necessary under the circumstances (Petition, A19, 26). This was contra to the District Court's finding that pipeline routes could have been predicted with a high degree of specificity and accuracy (Petition, A71), and that such information was necessary to assess potential impact on marine life and recreational activities (Petition, A78). Secondly, the Second Circuit found that the evidence relied upon by the District Court fell far short of demonstrating that the cost/benefit comparison was unfounded, or that it ignored any data (Petition, A33). The District Court found the opposite, i.e. that the Secretary's data and analysis were grossly defective (Petition, A96, 97). Respondents' failure to rebut the Petition's demonstration that the Second Circuit ignored or set aside the District Court's factual findings, which were based on live, testimonial evidence, is tacit admission that the Second Circuit disregarded Rule 52(a).

The substantial evidence in the record supporting the District Court's findings negates any such demonstration.

Secondly, respondents adopt the Second Circuit's premise that the trial court's determination as to the adequacy of the EIS, and what could reasonably be demanded of it under the circumstances (rule of reason), is not strictly a finding of fact which may not be set aside by the appellate court unless clearly erroneous, F.R.Civ.P. 52(a), but is an exercise of judgment by the trial court[3] and hence a question of law reviewable by the appellate court free of the constraints of the "clearly erroneous" rule.

The premise is flawed because it assumes that the "rule of reason" involves only a conclusion of law which can be reached by the appellate court without regard to the trial court's findings on the adequacy of an EIS.

Whether the scope of an EIS is adequate to comply with NEPA depends on whether the EIS discusses the relevant statutory factors. If it does not, then the EIS is defective as a matter of law, and not because of any "rule of reason". For example, NEPA, 42 U.S.C. §§ 4332(2)(c)(i) and (iii), requires the EIS to discuss impact and alternatives as relevant factors. An EIS which fails to do so is defective as a matter of law.

If, however, the EIS meets the threshold test of discussing a relevant factor, the trial court must then decide the "taking a hard look" issue of whether the content or depth of discussion in the EIS is sufficiently detailed under the circumstances of the case to permit informed and reasoned decision making. This issue is one primarily of fact for the trial court to decide, and the "rule of reason" is simply a surrogate for the test of factual adequacy to be applied by the trial court.

In applying the "rule of reason" the trial court takes into consideration what the agency knew or ought to have

[3] NOIA, 10; Secretary, 7, 8.

known and set forth as facts in the EIS regarding the relevant factors, taking into account the circumstances of the case, and considering the means reasonably available to it to obtain such knowledge. Obviously the facts and circumstances as to whether the EIS satisfies the "rule of reason" vary in each case.[4]

[4] In *NRDC* v. *Morton*, 458 F.2d 1827 (D.C. Cir. 1972), the EIS was held defective for failure to discuss in sufficient detail the alternatives and their incidental environmental risks and impacts. In declaring that the range and depth of discussion of alternatives was subject to a "rule of reason", the Court considered the following *factual* issues: a) the nature and scope of the proposed action and the concomitant range of alternatives; b) whether the additional information demanded was meaningfully possible and not too remote and speculative given the available studies and resoures of energy and research time; c) the ultimate decision makers for whose guidance the EIS was intended; d) whether the additional information on environmental effects of alternatives could be readily ascertained. The appellate court did not disturb the district court's finding of fact that the EIS failed to provide the detailed statement required by NEPA of alternatives. In *NRDC* v. *Callaway*, 524 F2d 75 (2d Cir. 1975), in an opinion by Judge Mansfield, the Second Circuit ruled an EIS defective for its inadequate content and scope of discussion of alternatives. It referred to the following *factual* criteria as pertinent in applying the rule of reason: a) the nature of the proposal; b) whether the EIS goes beyond mere assertions and provides sufficient supporting data and reasoning; c) whether the alternatives are of speculative feasibility or can only be implemented after significant changes in governmental policy or legislation; d) whether the alternatives may partially or completely meet the proposed action's goal. Nevertheless in *Callaway*, the Second Circuit reversed the district court's finding that the EIS was adequate in its discussion of alternatives, prompting dissenting opinion that the majority erred in not applying the "clearly erroneous" test of appellate review and that the majority decision was in conflict with *Sierra Club* v. *Morton*, 510 F2d 813, 818 (5th Cir. 1975). *Callaway* and the case at bar illustrate the Second Circuit's faulty concept of the "rule of reason" as an appellate review standard to be applied by the appellate court free of the constraints of Rule 52(a). In each of the cases cited by Secretary (8, n. 6) the "rule of reason" was referred to not as an appellate review standard, but as a factual test to be employed by the district court in adjudicating the fact intensive issue of the adequacy of the EIS.

If the trial court, upon its review of the EIS's content and depth of discussion of the relevant NEPA factors, and employing the elastic fact intensive "rule of reason" test, determines, based on findings of fact, that the EIS is inadequate, and thus does not satisfy the "rule of reason", the trial court's findings of fact may not be set aside by the appellate court unless shown by the latter to be "clearly erroneous".

In other words, the "rule of reason" test is not an appellate review substantive standard and does not replace the "clearly erroneous" requirement as a standard of appellate review. *On the contrary, the "rule of reason" applicable to a district Court's judicial review of an agency NEPA determination, is a factual test subject to the "clearly erroneous" appellate review standard.*[5]

We have shown that in addition to setting aside the District Court's findings of fact in disregard of the Rule

[5] This point finds support in *Sierra Club* v. *Morton, supra*, 510 F2d at 818, an OCS case. The Court there indicated that whether the EIS satisfies the "rule of reason", is a factual issue to be established by the preponderance of the evidence in the trial court. The Court ruled:

> "Having failed to convince the trial court that the EIS was inadequate, the plaintiffs must now demonstrate that the lower court's findings accepting the EIS as adequate and the decision to proceed as permissible were clearly erroneous." *Id.*

It follows that in the case at bar the respondent had the burden of proving that the District Court's findings rejecting the Sale 40 EIS as inadequate, were clearly erroneous. They failed in this burden and the Second Circuit erred in setting aside the findings, without showing that they were clearly erroneous. Indeed, the Second Circuit's "curious illogic" in substituting the "rule of reason" test as an appellate review standard has already been the subject of critical commentary in the legal literature. See "Second Circuit Puts Atlantic OCS Oil Development Back in Business", 7 ELR 10192 (Oct. 1977). This article also was critical of the Second Circuit's environmental divisibility doctrine and of its assumptions regarding the availability of "mid-course corrections" to minimize or eliminate future environmental hazards. See, Brief, *infra*, Sections II and IV.

52(a) standard, the Second Circuit inappropriately applied the "rule of reason" test as if it were a substantive standard of appellate review. Moreover, the cases cited by respondents in which the Rule 52(a) "clearly erroneous" standard was not applied[6] are readily distinguishable because: 1) the facts and the trial findings were not disputed and only a question of law as to the legal conclusions to be drawn therefrom was before the appellate court;[7] 2) the case involved the misapplication of law to facts;[8] 3) the appellate court found that no cause of action had been established and that the trial court's findings of fact were in any event conclusory in nature and not susceptible of proper appellate review;[9] 4) it was not necessary to resolve the question of the proper scope of appellate review of the treatment of environmental issues in an EIS and Rule 52(a) was not invoked.[10]

The historical reluctance of this Court to relax the "clearly erroneous" standard of appellate review, except in severely limited circumstances not applicable to this case, is based upon its desire to maintain a clear line of definition between the respective functions to be performed by trial and appellate courts. As is dramatically illustrated by the case at bar, inappropriate relaxation of this standard—under circumstances where the reviewing court disturbs a lower court's findings of fact which are based on extensive, live testimony, and a careful weighing of the evidence—does mischief to well-settled notions of appellate review, weakens the fabric of the federal judicial system, and obscures the scope of judicial review in a NEPA case.

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[6] NOIA, 11; Secretary, 7, 8, 9.

[7] *U.S.* v. *Mississippi Valley Gen. Co.*, 364 U.S. 520, 526 (1961); *U.S.* v. *Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960); *U.S.* v. *General Motors*, 384 U.S. 127, 141, n. 16 (1966).

[8] *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974).

[9] *Dalehite* v. *U.S.*, 346 U.S. 15 (1953).

[10] *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 326, n. 28 (1975).

II

Respondents' next advance the Second Circuit's premise that deferment of assessment of the environmental risks involved in transporting oil to shore, to the preparation of a Development Plan EIS at a subsequent stage of the project, would not violate the "rule of reason" because of the federal government's continued power to regulate OCS related activities so as to minimize or eliminate such environmental hazards.[11] This premise is also flawed because whether such deferment will or will not prejudice the ability to minimize or eliminate environmental hazards not evaluated in the Sale 40 EIS, is not a question of law to be decided by the appellate court under the rubric of the "rule of reason". It is in reality a question of fact to be decided by the trial court on the evidentiary record, and whose factual determination is not reversible unless "clearly erroneous". Although the District Court examined and found reason to reject the concept of deferment,[12] the Secon Circuit, without any basis in the evidentiary record, and in violation of the "clearly erroneous" rule, set aside this finding, by simply ignoring it.

III

As noted previously, the Second Circuit set aside the District Court's detailed evidentiary finding of fact on the cost/benefit issue in violation of the Rule 52(a) "clearly erroneous" standard.

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[11] NOIA, 12; Petition, A19, 20.

[12] The District Court found that allowing the project to proceed without full assessment now would: 1) involve the commitment of resources which will either be lost if the project is later abandoned or modified, or which will impermissibly tilt the scales in favor of proceeding; 2) result in foreclosing otherwise available alternatives (Petition, A123); 3) prejudice state Coastal Zone Management coordination and planning (Petition, A61, 62, 79, 115, 116). *Sierra Club* v. *Morton, supra*, 510 F2d at 824, 826,

(footnote continued on following page)

Respondents admit that the Second Circuit disturbed some of the District Court's findings of fact as to the cost/benefit issue,[13] but they attempt to skirt the "clearly erroneous" rule by characterizing these as non-EIS issues, and describing the cost/benefit data as non-environmental evidence.[14] But Rule 52(a) does not except findings of fact on "non-EIS" issues from the "clearly erroneous" requirement. It is also incorrect to treat the cost/benefit issue as a "non-environmental" issue. NEPA requires that cost/benefit data and analysis be contained in and circulated as part of the NEPA record, a requirement which was not accomplished in this case. Without an accurate cost/benefit analysis, the Secretary was prevented from complying with the "hard look" and "weighing of alternatives" requirements of NEPA.[15]

(footnote continued from preceding page)

illustrates that whether the Secretary's continuing control of OCS related activities justifies deferment and a lesser standard of sufficiency of the material contained in the EIS, under the "rule of reason", is a factual issue dependent on the facts and circumstances of the case. The geography of the Gulf of Mexico, the prior history of OCS lease sales, extensive drilling, oil spills, pipeline accidents, federal-state consultation regarding OCS development and operational success and failure of similar projects and the absence of any evidence as to the feasibility and possibility of the alternative of selling additional tracts off the coasts of Louisiana and Texas prior to the MAFLA sale were all factors considered by the Court in applying the "rule of reason" to justify deferment. In the instant case, the District Court was entitled to find that a higher test of EIS factual sufficiency was demanded under the "rule of reason", given the frontier aspects of Sale 40, the defective cost/benefit analysis, and the evidence of alternatives that would be foreclosed if the sale were allowed to proceed and the deferment concept accepted.

[13] NOIA, 11, n. 8; Secretary, 9, 10.

[14] NOIA 14; Secretary, 9 n. 8.

[15] Petition, 22. In any event the District Court found that the cost/benefit analysis was an issue with important environmental consequences. It found the cost estimate of exceptional signifi-

(footnote continued on following page)

The premise that the District Court should not have reached a judgment as to the factual inadequacy of the administrative record[16] and cost/benefit analysis, and thereby rejected the Secretary's cost/benefit analysis, is inconsistent with and must yield to the duty of the District Court to make findings of fact on this issue.

IV

The Second Circuit ruled that had the Secretary retained less power to regulate the transportation phase of the Sale 40 project, Appellees' arguments might have some merit (Petition, A24, 25), but that since the project was environmentally divisible

> "Should the Secretary determine that only pipelining is environmentally acceptable, however, even though economically unfeasible, at the moment, under Sec. 1334(a)(1) he retains ample authority to suspend operations until a technology is developed under which use of pipelines is economically and technically feasible." (Petition, A26)

The Secretary has recently adopted a "suspension regulation". 42 Fed. Reg. 53956, 53963 (1977). However,

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(footnote continued from preceding page)

cance in light of the "Secretary's firm assumption that pipelines rather than tankers, would be the actual mode of transport" (Petition, A85). It also found that because the economic costs and benefits were so seriously and grossly misrepresented or omitted, there could be no adequate balancing of economic benefits against environmental costs (Petition, A97). A weighing of the economics of any alternative against the environmental and social impacts of that alternative is necessary in order to comply with NEPA.

[16] NOIA's attempt to explain away the requirement of an adequate administrative record, *NRDC* v. *NRC*, 547 F2d 633 (D.C. Cir. 1976), by charging Suffolk County with failure to complain about the inadequate cost/benefit analysis fails because the absence of such analysis from the EIS and the failure of the Secretary to circulate the PDOD precluded any comment on this subject.

relying on *Union Oil Co.* v. *Morton,* 512 F.2d 743 (9th Cir. 1975), the oil industry has challenged the regulation. *Western Oil & Gas Association (WOGA) et al.* v. *Andrus,* Case No. 773987 (filed October 25, 1977, C.D. Cal.). If their suit is successful, the Secretary will not be able to promulgate a suspension regulation enforceable against Sale 40, and therefore will lack completely a termination power. Consequently, the Second Circuit's premise regarding the Secretary's power to insure environmental safeguards through his power of suspension would be nullified.

The oil industry's challenge to the Secretary's suspension regulation underscores the conflict between the Second Circuit's view of environmental divisibility and the Ninth Circuit's decision in *Union Oil Co.* v. *Morton, supra,* regarding the power of the Secretary to cancel leases for violation of rules and regulations issued after the lease has been executed.

A recent decision of the First Circuit in Massachusetts *(Commonwealth of Massachusetts, Conservation Law Foundation of New England, et al.* v. *Andrus, et al.,* U.S. District Court for the District of Massachusetts, Civil Actions Nos. 78-0184G, 78-0186G) also appears to place that Court in conflict with the Second Circuit on the issue of environmental divisibility. The Commonwealth of Massachusetts and a number of environmental and fishing groups brought actions to enjoin North Atlantic OCS lease Sale 42 in the area known as the Georges Bank, scheduled for January 31, 1978. The Secretary's decision to hold Sale 42 was based on a Final Environmental Impact Statement (EIS), issued August 29, 1977 and a Program Decision Option Document (PDOD) dated September 26, 1977. The actions charged the defendants Secretary of the Interior Andrus and Secretary of Commerce Kreps with procedural and substantive violations of the OCS Lands Act, 33 U.S.C. §§ 1331-1343; the Fisheries

Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882; NEPA, 42 U.S.C. §§ 4321-4347; and the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434.

On January 27, 1978, after three days of hearings, the U.S. District Court for the District of Massachusetts (per Judge W. Arthur Garrity), issued a preliminary injunction staying lease Sale 42. A copy of Judge Garrity's Order is set forth as Appendix A.[17]

The Secretary, joined by various oil industry intervenors, appealed to the First Circuit for a stay of the lower court's injunction. On January 30, 1978, the First Circuit (per Judge Levin H. Campbell) refused to grant such stay. A copy of the First Circuit's Memorandum and Order is attached as Appendix "B". No appeal was taken to the Supreme Court, and lease Sale 42 was indefinitely postponed.

As in the case at bar, the Secretary and intervenor-defendants in the Sale 42 litigation opposed the motion for preliminary injunction by relying on the MAFLA case, *Sierra Club* v. *Morton, supra,* 510 F.2d at 828, the Second Circuit's opinion in the case at bar, *County of Suffolk* v. *Secretary of Interior,* 562 F.2d 1368 (2d Cir. 1977), and by advancing the rationale of enviromental divisibility and the Secretary's "continuing control". (Intervenor-Defendants' Memorandum in Opposition to Motion for Preliminary Injunction, p. 16). However, these arguments failed to persuade the Massachusetts District Court and First Circuit to allow the Sale to proceed.

Whether the indefinite suspension or termination by the Secretary of an executed OCS lease to prevent actual or

[17] The County made efforts to obtain the full transcript of Judge Garrity's January 28, 1978 oral decision, intending to attach it as an appendix to this Brief. However, due to mail delivery slowdowns resulting from the recent snowstorm, this document could not be obtained prior to printing. Upon receipt, it will be forwarded to the Court as a special appendix.

threatened environmental damage is a permissible exercise of his "continuing" regulatory power, or an invalid taking, is an issue also pending in the Ninth Circuit, in *People of the State of California* v. *Morton*, 404 F. Supp. 25 (C.D. Cal. 1975), on appeal, Ninth Circuit, No. 76-1431; and *Southern California Association of Governments* v. *Kleppe*, 413 F. Supp. 563 (D.D.C.); and in the District of Columbia, in *State of Alaska* v. *Kleppe*, unofficially reported at 9 E.R.C. 1497 (D.D.C.) appeal pending, C.A.D.C. No. 76-1829. The conflict between the Circuits and the pending litigation in the First, Ninth and District of Columbia Circuits over the environmental divisibility and the Secretary's "continuing powers" issues infects the national OCS leasing program with great uncertainty as to the powers of the Secretary to control OCS development in an environmentally acceptable manner.

The national importance of the energy and environmental issues raised by this petition is not disputed by respondents and is further emphasized by recent developments.

Both Houses of Congress have now passed legislation amending the OCS Lands Act and requiring additional environmental, safety, and economic safeguards governing the way in which Federal offshore oil and natural gas reserves are developed. (N.Y. Times, February 3, 1978, p. D 1, 3; Wall Street Journal, February 3, 1978, p. 2). Under the new OCS legislation, companies developing leases would be required to submit more detailed plans and the Secretary would be allowed to suspend or cancel any leases. New emphasis is also placed on using the most advanced and safety technology available (N.Y. Times, id. D3).

Are the new powers which would be provided the Secretary under the new OCS legislation, a codification of or supplement to the Secretary's continuing powers under the Second Circuit's environmental divisibility doctrine?

Would development under Sale 40 and other existing OCS leases, be subject to the additional regulatory authority granted the Secretary by the new legislation? These are issues whose resolution requires the grant of certiorari. It is clear that whether or not the new OCS legislation is enacted the issue of the Secretary's continuing power under the Second Circuit's environmental divisibility doctrine, and its applicability to existing and future leases, remains unsettled in each of the branches of government.

Conclusion

This case transcends NEPA. It involves the integrity of the processes of judicial review of agency determinations and appellate review of judicial determinations.

The Second Circuit's opinion misconstrues both judicial functions. The effect of its errors puts our environment at great risk. Grant of the petition for certiorari is necessary to protect the judicial process and the environment.

Dated: February 8, 1978

Respectfully submitted,

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Appendix "A".

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 78-184-G

COMMONWEALTH OF MASSACHUSETTS ET AL.,

Plaintiffs,

v.

CECIL D. ANDRUS ET AL.,

Defendants.

CIVIL ACTION No. 78-186-G

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC., ET AL.,

Plaintiffs,

v.

CECIL D. ANDRUS ET AL.,

Defendants.

PRELIMINARY INJUNCTION

January 28, 1978

GARRITY, J. Upon consideration of plaintiffs' motion for a preliminary injunction and supporting and opposing affidavits and memoranda of law, and after hearing at which several exhibits were received and considered, it is hereby ORDERED on the basis of findings and conclusions included in a memorandum of decision dictated in open court to the court reporter at the conclusion of the hearing on January 28, 1978, that the defendant Andrus be enjoined until

Appendix "A".

further order of the court from taking further steps to consummate North Atlantic Lease Sale No. 42, of which notice appears at 42 Fed. Reg. 65285 dated December 30, 1977, in particular accepting, receiving, retaining or opening bids for tracts covered by said notice.

For reasons stated in the dictated memorandum of decision it is also ordered that Rule 65(c), Fed. R. Civ. P., is inapplicable to this case and that plaintiffs need not post a security bond.*

W. Arthur Garrity, Jr.
United States District Judge

* This order is confirmatory of an oral order entered on January 28 at the request of the defendants so that their appeal might be expedited.

Appendix "B".

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 78-1036

Commonwealth of Massachusetts, et al.,
and
Conservation Law Foundation of
New England, Inc., et al.,
Plaintiffs, Appellees,

v.

Cecil D. Andrus, et al.,
Defendants, Appellants.

Atlantic Richfield Company, et al.,
Intervenors.

No. 78-1037

Commonwealth of Massachusetts, et al.,
and
Conservation Law Foundation of
New England, Inc., et al.,
Plaintiffs, Appellees,

v.

Cecil D. Andrus, et al.,
Defendants,

Atlantic Richfield Company, et al.,
Intervenors, Appellants.

Appendix "B".

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr., U.S. District Judge]

Before
CAMPBELL, *Circuit Judge.*

MEMORANDUM AND ORDER

Entered: January 30, 1978

A court of appeals may reverse the district court's issuance of a preliminary injunction only if it has been demonstrated that the court abused its discretion or committed a clear error of law. *Roselli* v. *Affleck,* 508 F.2d 1277, 1280 (1st Cir. 1974), *cert. denied,* 421 U.S. 967 (1975). By the same token, a judge of the court of appeals may stay such an injunction on an emergency basis, prior to the court's hearing of the appeal, only if it is most clearly manifest that the lower court acted beyond its authority.

While appellants attempt to paint the district court's action as both "unprecedented" and as an invasion of the powers of the executive branch, I am unable to say from my limited exposure to the extensive record below, and from the briefs and arguments presented, that the district court has necessarily acted arbitrarily or erroneously. While I have yet to reach a final view, it is at least not inconceivable to me that 43 U.S.C. § 1332(b) and 1334, when read with other statutory provisions and legal doctrines, impose on the Secretary of the Interior the sort of fiduciary role ascribed by the district court. If so, it is possible, in light of his own expressed views on the matter, that the Secretary acted capriciously by proposing to accept bids

Appendix "B".

now without awaiting the outcome of the protective legislation pending in Congress to which he had referred. And the failure of the environmental impact statement even to mention the possible application of the so-called marine sanctuary legislation, 16 U.S.C. § 1432, to the Georges Bank area may have been an oversight serious enough to require rectification before bids can be accepted. At least, I am unwilling at this time to project these questions as being foreclosed, given the long term importance of the underlying issue.

I cannot say, furthermore, that the judge below was without reason in finding that acceptance of the leases as scheduled would cause irreparable harm. While direct harm from exploration seems unlikely to occur within the next several months, it could occur within the year, and permitting the acceptance of bids now could have irreversible consequences in other respects.

In sum, when dealing with a resource, such as the Georges Bank fishery, which, as the district court says, "has taken millions of years to accrue, and which will be with us for better or worse for untold centuries to come," a delay of several months in order to give meaningful judicial consideration to these questions seems not unreasonable. There may be issues more serious than ones involving the future of the oceans of our planet and the life within them, but surely they are few.

Although the stay is denied, the appeal should be heard and decided as rapidly as possible. The parties have indicated their willingness to expedite their appeals.

The parties are granted leave to proceed upon the certified record upon appeal without reproduction in appendix form. Briefs for appellants are to be filed by February 14, 1978. Briefs for appellees are to be filed by February 28, 1978.

Appendix "B".

These cases are to be heard at the March, 1978, session.

By the Court,

DANA H. GALLUP
Clerk

[Cert.c., Clerk, U.S.D.C., Mass.; cc. Messrs. Zimmerman, Bruce, Foy, Leonard, Van Loon and Fitch.]